No. 98-822

Supreme Court, U.S.
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In The

Supreme Court of the United States

FRIENDS OF THE EARTH, *et al.*,

Petitioners,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

AMICUS BRIEF OF NATURAL RESOURCES DEFENSE COUNCIL, INC., CLEAN WATER ACTION, INC., AMERICAN LITTORAL SOCIETY, DELAWARE RIVERKEEPER NETWORK, CITIZENS FOR A BETTER ENVIRONMENT, DELTA KEEPER, A PROJECT OF THE SAN FRANCISCO BAYKEEPER, CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, FLORIDA PUBLIC INTEREST RESEARCH GROUP, ILLINOIS PUBLIC INTEREST RESEARCH GROUP, MASSACHUSETTS PUBLIC INTEREST RESEARCH GROUP, PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN, PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, OHIO PUBLIC INTEREST RESEARCH GROUP, OREGON STATE PUBLIC INTEREST RESEARCH GROUP, WASHINGTON PUBLIC INTEREST RESEARCH GROUP, CHESAPEAKE BAY FOUNDATION, INC., AMERICAN CANOE ASSOCIATION, INC., NEUSE RIVER FOUNDATION, PENNSYLVANIA ENERGY PROJECT, SAN DIEGO BAYKEEPER, FOREST GUARDIANS AND DON'T WASTE ARIZONA IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*

Amici are not-for-profit public interest organizations working to protect the environment and the public health.[1] *Amici's* work includes influencing environmental and public health legislation, persuading policy makers to provide greater environmental and public health protection, and conducting research into environmental and public health problems. *Amici* agree, however, that in the end "enforcement of the law is what really counts." *Evans v. Jeff D.*, 475 U.S. 717, 743 (1986) (Brennan, J., dissenting). Accordingly, *amici* regularly employ the citizen suit provisions of environmental laws, such as the Clean Water Act, to enforce those laws. This interest of *amici* is threatened by the Fourth Circuit's decision in this case.

INTRODUCTION

I. THE IMPORTANCE OF COMPLIANCE AND DETERRENCE UNDER THE CLEAN WATER ACT.

The Water Pollution Control Act Amendments of 1972 (commonly referred to as the "Clean Water Act") fundamentally changed the nation's approach to water pollution. The Clean Water Act prohibits any point source discharge to the surface waters of the United States unless that discharge is "in compliance" with various requirements of the Act. 33 U.S.C. § 1311(a). These requirements are applied to individual dischargers through the National Pollutant Discharge Elimination

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[1] Counsel for the parties have consented to the filing of this *amicus curiae* brief, and the letters of consent are being filed with this brief. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity other than *amici* has made a monetary contribution to the preparation or submission of this brief.

System ("NPDES") program, the central feature of which is the issuance of individual NPDES discharge permits. *See* 33 U.S.C. § 1342.[2] This "discharge elimination" program, in turn, was designed to further the Act's "national goal" that "the discharge of pollutants into the navigable waters be eliminated." 33 U.S.C. § 1251(a)(1).

Congress believed that strong enforcement measures would be necessary to change the behavior of dischargers and make the goals of the Act a reality. *See, e.g.*, Statement of Sen. Bayh (Oct. 4, 1972) *reprinted in 1 A Legislative History of the Water Pollution Control Act Amendments of 1972* (1973) at 216 ("without strict enforcement and meaningful deterrents, water pollution control laws will have no real effect."). Accordingly, Congress authorized the United States Environmental Protection Agency ("EPA"), and, in certain circumstances, citizens, to seek civil penalties and injunctive relief against violators of the Act. The result is an enforcement system designed to bring those who are out of compliance into compliance, and to deter future violations.[3] The availability of civil penalties is central to this enforcement scheme.

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[2] NPDES permits are issued by the United States Environmental Protection Agency or, where the state in which the discharge occurs is operating a Clean Water Act program that meets federal criteria and has been approved by EPA, by the state.

[3] The 1972 Act authorized court-imposed civil penalties of $10,000 per day per violation. In 1987, Congress increased the maximum civil penalty to $25,000 per day per violation, *see* 33 U.S.C. § 1319(d), and authorized EPA to impose administrative penalties. *Id.* § 1319(g). *See* 133 Cong. Rec. H175 (daily ed. Jan. 8, 1987) (statement of Rep. Nowak) (increased penalty focus was designed to "reduce violations of the Act and discourage those parties who would choose to violate the Act with little fear of punishment.")

II. THE ROLE OF CITIZEN SUITS IN ENFORCING THE ACT.

In the "citizen suit" provision of the Clean Water Act, Congress gave persons affected by violations of the Act a private right of action "to enforce" the Act against violators. 33 U.S.C. § 1365(a). As the language and legislative history of the Act make clear, Congress intended citizen suits to be an essential component of the Act's enforcement scheme. *See* 33 U.S.C. § 1251(e) ("Public participation in the development, revision, and *enforcement* of any regulation, standard [or] effluent limitation . . . shall be provided for, encouraged, and assisted by the Administrator [of EPA] and the States.") (emphasis added). Congress provided for citizen suits because it recognized that EPA and the states would not always have the resources, or the political will, to enforce the Act as Congress intended. Thus, while the federal and state governments have primary enforcement authority,[4] citizen suits are an essential component of an enforcement scheme that emphasizes compliance and deterrence.

Congress included certain "gatekeeper" provisions in the Clean Water Act to minimize conflicts between citizen enforcement and agency enforcement. The Act requires that, prior to filing suit, citizens give sixty days' notice of the alleged violation to the violator, EPA, and the state. *See* 33 U.S.C. § 1365(b)(1)(A). If EPA or the state wishes to wholly preclude a citizen suit, it may file and "diligently"

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[4] As between the two, the overriding authority rests with the federal government. The Clean Water Act created a federal program designed to serve a set of clearly articulated federal interests. *See, e.g., EPA v. State Water Resources Control Board*, 426 U.S. 200, 206-208 (1976) (explaining federal primacy in Clean Water Act implementation).

prosecute its own judicial enforcement action[5] after receiving the citizen's notice of suit. *See id.* § 1365(b)(1)(B).[6] Unless EPA or the state does so, however, or unless the violator takes all corrective action

[5] In discussing the degree of "diligence" required, the Senate Report noted that "if the court viewed the agency action as inadequate, it would have jurisdiction to consider the citizen action notwithstanding any pending agency action." S. Rep. No. 92-414, 92nd Congress, 2d Session, p. 80 (1971), *reprinted in 1972 U.S. Code Cong. and Admin. News* 3668, 3746. After a lengthy factual hearing, at which several witnesses testified, the district court in this case concluded that a state court consent decree negotiated between Laidlaw and the State of South Carolina did not constitute "diligent" prosecution. *See Friends of the Earth v. Laidlaw Environmental Services*, 890 F. Supp. 470, 478-480, 484, 489, 493 (D. S.C. 1995) (identifying at least twelve separate factors indicating lack of diligence in the state's enforcement proceeding).

[6] Agency administrative action also precludes a citizen penalty action, but only when the agency's action was begun prior to service of the citizen's sixty day notice and diligently seeks (or has imposed) an administrative penalty for the same violations under 33 U.S.C. § 1319(g), or under a comparable state law. *Id.* at § 1319(g)(6)(A) & (B). An administrative penalty action does not, however, bar a citizen action for injunctive relief where the discharger remains in violation. *See id.* § 1319(g)(a) (only "a civil penalty action" brought by the United States or a citizen is barred). It is evident that Congress was aware of the interplay it was creating between agency actions and citizen suits. *E.g.*, S. Rep. No. 99-50 at 28 (1985) ("This amendment . . . strikes a balance between two competing concerns: The need to avoid placing obstacles in the path of such citizen suits and the desire to avoid subjecting violators of the law to dual enforcement actions or penalties for the same violation"). After explaining that the "balance" chosen was the middle ground of Section 1319(g)(6)(A), the Senate Report then notes that an agency "can prevent duplicate proceedings by . . . bringing its own judicial action before a citizen suit is filed." *Id.*

necessary to ensure sustained compliance with the Act, *see Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987) (citizens may not bring suit if violations are not "ongoing" at the time of the filing of the complaint), the citizen may file suit after the expiration of the notice period.

Congress thus drew a bright line between the time prior to the filing of the citizen suit and the time following the filing of suit. Where the regulatory agencies and the violator fail to address violations adequately prior to the filing of the citizen suit, citizens are authorized to bring suit to enforce the Act, and to seek both injunctive relief and civil penalties.[7]

SUMMARY OF ARGUMENT

The Fourth Circuit in this case erred in two respects. First, the Fourth Circuit erred in holding that there is no longer an Article III case or controversy here. The Fourth Circuit was incorrect in concluding that the plaintiffs' injuries could not be redressed by the deterrent effect of imposing civil penalties on Laidlaw, and in relying on *Steel Company v. Citizens for a Better Environment*, 523 U.S. ___, 118 S. Ct. 1003 (1998), to arrive at that conclusion.

[7] This answers the concern, expressed by South Carolina business *amici* in their opposition to *certiorari*, that citizen suits "might ultimately discourage out of court settlements between agencies and regulated entities." Brief of *Amici Curiae* South Carolina Chamber of Commerce, *et al.*, on Petition for Writ of Certiorari, p. 13. The congressional goal in crafting the Act's enforcement provisions clearly was compliance and deterrence, and not settlement *per se*. So long as agencies and violators enter into enforcement agreements that meet these goals, violators will be free of subsequent citizen enforcement for the same violations.

In *Steel Company*, the plaintiffs did not allege ongoing harm, and there thus was nothing for civil penalties to deter. In the case at bar, however, the plaintiffs alleged and proved ongoing violations of the Clean Water Act. This Court specifically noted in *Steel Company* that, where there are allegations of future violations, judicial relief aimed at deterring those violations satisfies the redressability requirement of Article III. 118 S. Ct. at 1019. Congress recognized in the Clean Water Act that when ongoing violations are proven, civil penalties specifically deter future violations, and such deterrence benefits citizen plaintiffs. That Congressional finding is consistent with common sense, an extensive body of empirical literature, and this Court's prior opinions. That finding is also entitled to deference.

Even if Congress had not determined that penalties must be imposed on Clean Water Act defendants to deter their future misconduct, violators who come into compliance with the Act after being sued would bear a heavy burden in attempting to establish that they will not violate in the future (and thus that there is no need for deterrence). Laidlaw did not meet that heavy burden here.

Second, even if the case is moot, the Fourth Circuit erred by refusing to consider whether, for purposes of an application for fees and costs, this citizen suit was a "catalyst" in bringing this defendant into compliance with the Clean Water Act. This Court has consistently held that claims for fees and costs survive the conclusion of the merits phase of litigation, whether the merits are resolved through a final judgment, a settlement, or a mooting of the case through the actions of a defendant.

The Fourth Circuit reached its conclusion with regard to fees by drawing an incorrect inference from the 1987

amendments to the Clean Water Act citizen suit provision. Congress in 1987 clarified that Clean Water Act plaintiffs who lose their cases cannot receive fees, but Congress at the same time reaffirmed that plaintiffs who achieve even partial success are entitled to fees. Congress was aware of this Court's "catalyst" jurisprudence when it amended the citizen suit provision, and Congress chose language in amending that provision that logically incorporates the catalyst test.

If the Fourth Circuit's opinion were allowed to stand, defendants would be encouraged to defend against meritorious citizen suits, and comply with the Clean Water Act only when it appears that a final judgment is imminent. Under the Fourth Circuit's reasoning, such defendants would thus avoid paying a penalty for their violations. Citizens would be far less likely to bring actions to enforce the Clean Water Act, or to enforce any other legislation where Congress has authorized citizens to seek civil penalties and recover fees when successful. Because citizen enforcement is central to the goals of the Clean Water Act, such an outcome would frustrate not only Congress's specific authorization of citizen enforcement, but also its overriding goal of improving the quality of the nation's waters.

ARGUMENT

I. THE IMPOSITION OF CIVIL PENALTIES REDRESSES A CITIZEN PLAINTIFF'S INJURY BY DETERRING FUTURE VIOLATIONS.

In Clean Water Act citizen suits, the plaintiff typically satisfies the case or controversy requirement of Article III by demonstrating that he or she is being injured by

violations of the Act, and that this injury will be lessened by relief designed to deter such violations in the future.[8]

In the case at bar, the plaintiffs are injured because, although they would like to catch and eat fish from the North Tyger River, they refrain from doing so due to the risks associated with being exposed to mercury discharged by Laidlaw into the river. Further, the evidence in the case shows that fish from the river contain mercury, and that the plaintiffs' concern is reasonable. *Friends of the Earth v. Laidlaw Environmental Services (TOC)*, 956 F. Supp. 588, 601 (D. S.C. 1997). It is commonly known that the ingestion of mercury can be hazardous; as the district court found in this case, "[m]ercury is an extremely toxic pollutant." *Id.* at 601.[9]

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[8] A party has Article III standing to bring suit in federal court when: (1) that party "personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant" (often referred to as "injury-in-fact"); (2) the injury "fairly can be traced to the challenged action;" and (3) the injury "is likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (citations omitted).

[9] As this case demonstrates, persons using a waterway can be adversely affected by violations of the Act, and thus "injured" for Article III purposes, before pollution levels increase so much that plants or animals start dying or public health warnings are posted. Abatement of pollution for the purpose of preventing the despoliation of a waterway is an express goal of the Clean Water Act, and one in which citizens have a concrete interest. As discussed *supra*, Part I, Congress determined in the Clean Water Act that it is the "national policy" that there should be *zero* (as opposed to environmentally benign) discharges of pollutants into the nation's waters. 33 U.S.C. §§ 1251(a)(1) and (6). Moreover, it is the effect of the illegal mercury discharges on the plaintiffs, not the effect on the river, that is the focus of the Article III inquiry. Reasonable

The plaintiffs' injury can be traced to Laidlaw's violations of the Act. To the extent that Laidlaw complies with its NPDES permit limit for mercury, less mercury is present in the river, less mercury gets into the fish that swim in the river, and the plaintiffs' concerns about mercury exposure are reduced. The relief sought by the plaintiffs will redress their injuries, because the imposition of a civil penalty on Laidlaw will deter future violations, and reduce the likelihood that mercury will be illegally discharged to the river.

The Fourth Circuit, however, read this Court's opinion in *Steel Company v. Citizens for a Better Environment*, 523 U.S. ___, 118 S. Ct. 1003 (1998), as prohibiting federal courts from considering the deterrent effect of penalties when determining whether there is an Article III case or controversy in citizen suits to enforce the Clean Water Act:

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people could decide that they want to ingest or be exposed to as little mercury as possible – even below levels determined by regulatory agencies to pose no known health risk to humans. Indeed, people make this kind of decision all the time: people use water filters in homes where city tap water has been declared safe, and people buy organically grown fruits and vegetables to avoid pesticides even though the government has set health standards governing the amount of pesticides permitted on conventionally grown fruits and vegetables. *See Duke Power Co. v. Env'tl Study Grp., Inc*, 438 U.S. 59, 74 (1977) (concern about exposure to radiation from licensed nuclear power plant sufficient injury-in-fact "given our generalized concern about exposure to radiation and the apprehension flowing from the uncertainty about the health and genetic consequences of even small emissions like those concededly emitted by nuclear power plants.")

> Prior to *Steel Co.* . . . this court had held that because 'penalties can be an important deterren[t] against future violations,' they could redress a private plaintiff's injury from the violations even though the penalties are not paid to the plaintiff . . . Because *Steel Co.* represents 'a superseding contrary opinion of the Supreme Court,' we are required to follow it.

Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc., 149 F.3d 303, 306 (4th Cir. 1998) (citations omitted). This misreads *Steel Company*, and puts the Fourth Circuit's opinion squarely at odds with this Court's jurisprudence on the deterrent effect of penalties.

In *Steel Company*, there was no allegation of future violations, and thus nothing to deter. *Id.* at 1019. As this Court noted in that case, however, where a citizen plaintiff alleges harm from "a continuing violation or the imminence of a future violation," judicial relief designed to deter future violations will "remedy that alleged harm." *Id.* at 1019. That is precisely the situation here, and precisely the role that Congress envisioned for civil penalties under the Clean Water Act. As this Court has noted, civil penalties serve as "a means of ensuring compliance" with the Clean Water Act. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982) ("An injunction is not the only means of ensuring compliance. The [Clean Water Act] . . . provides for fines and criminal penalties.").

The plaintiffs in this case alleged and proved continuing harm, and sought both a civil penalty and injunctive relief in an effort to ensure that Laidlaw would not violate in the future. After trial, the district court determined that an injunction was not necessary, and that the imposition of a civil penalty would "provide adequate deterrence under the circumstances of this case." *Friends of the Earth v. Laidlaw Environmental Services (TOC)*, 956 F. Supp. at 611. It is this specific deterrence of Laidlaw's

propensity to violate in the future that redresses the plaintiffs' injury in this case.

A. Congress Has Determined That The Imposition Of Civil Penalties On Violators Of The Clean Water Act Deters Them From Violating The Act In The Future.

The Clean Water Act specifies that, when a violation of the Act is established in a court proceeding, the violator "*shall* be subject to a civil penalty not to exceed $25,000 per day for each violation." 33 U.S.C. § 1319(d) (emphasis added). As the Fourth Circuit itself has recognized, see *Stoddard v. Western Carolina Regional Sewer Authority*, 784 F.2d 1200, 1208 (4th Cir. 1986), this is a mandate to the district courts to impose a penalty on violators of the Act. *Accord, Atlantic States Legal Found., Inc. v. Pan American Tanning Corp.*, 993 F.2d 1017, 1021 (2d Cir. 1993); *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1140-42 (11th Cir. 1990).[10]

Among the factors that Congress directed the district courts to consider in calculating the amount of the penalty are "the economic benefit (if any) resulting from the violation," and "the economic impact of the penalty on the violator." 33 U.S.C. § 1319(d). This indicates that Congress intended the penalty to create an economic incentive for the violator to refrain from violating the Act in the future. *See Tull v. United States*, 481 U.S. 412, 422-23 (1987) (Clean Water Act's legislative history "reveals that Congress wanted the district court to consider the need

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[10] In contrast, the decision as to whether to impose *administrative* penalties under section 1319(g) of the Act is left to the discretion of EPA. *See* 33 U.S.C. § 1319(g) (" . . . the Administrator . . . *may*, after consultation with the State in which the violation occurs, assess a . . . civil penalty . . . under this subsection") (emphasis added).

for retribution and deterrence, in addition to restitution, when it imposed civil penalties," and the district court may "seek to deter future violations by basing the penalty on its economic impact.")[11] By directing that courts consider the economic impact on the specific violator being prosecuted, Congress indicated that it expected penalties to deter that violator specifically.

The congressional determination that penalties are needed to deter future violations is entitled to considerable weight. As a general matter, the factual (and policy) determinations of Congress are given substantial deference by this Court. *See, e.g., Hodel v. Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264, 276 (1981). Moreover, as this Court has specifically recognized, the factors influencing the choice of which remedy or remedies will most effectively solve "the . . . problem of deterrence" are "matters within legislative competence." *Tigner v. State of Texas*, 310 U.S. 141, 149 (1940).

Congress's determination as to the deterrent value of penalties under the Clean Water Act also has important Article III implications. As noted in *Havens Realty Co. v.*

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[11] The enumerated factors to be considered in setting the amount of the penalty were added as part of the 1987 amendments. As noted in the Senate Report on the 1987 amendments, Congress believed that disgorging the economic benefit earned as a result of noncompliance is an important factor in reducing the economic incentive to violate in the future. *See* S. Rep. No. 99-50, at 25 (1985) ("Violators should not be able to obtain an economic advantage vis-à-vis their competitors due to their noncompliance with environmental laws."). *See also Tyson Foods*, 897 F.2d at 1141 ("Insuring that violators do not reap economic benefit by failing to comply with the statutory mandate is of key importance if the penalties are successfully to deter violators.").

Coleman, 455 U.S. 363, 373 (1982), "congressional intention cannot be overlooked" in determining whether the pursuit of a judicial remedy afforded by statute constitutes a case or controversy under Article III. *See also Lujan v. Defenders of Wildlife*, 504 U.S. 505, 580 (1992) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.") (Kennedy, J. and Souter, J., concurring).

Here, Congress has expressed its intent that violators of the Clean Water Act "shall be subject to a civil penalty," 33 U.S.C. § 1319(d), because Congress believed that this remedy would create an economic deterrent to future violations. Since the deterrence of future violations will redress the injury of citizen plaintiffs who seek to avoid the adverse effects of such violations, Article III is satisfied.

B. There Is Ample Evidence That Penalties Do In Fact Deter Future Violations.

The deterrent effect of monetary sanctions has long been recognized, *e.g.*, Richard A. Posner, ANTITRUST LAW, AN ECONOMIC PERSPECTIVE, at 221 (1976) (statutory treble damages in antitrust litigation perform a deterrence function against violators of the law), and the economic theory of deterrence is well-developed. *See, e.g.*, Richard A. Posner, ECONOMIC ANALYSIS OF THE LAW, at 265 (4th Ed. 1992) ("[T]he primary function of law, in an economic perspective, is to alter incentives."); George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526 (1970). In general, "[d]eterrence is a function of the expected punishment, which is a product of both the perceived probability and severity of punishment." Michael J. Metzger, *Treble Damages, Deterrence, and Their Relation to*

Substantive Law: Ramifications of the Insider Trading Sanctions Act of 1984, 20 VAL. U. L. REV. 575, 595 (1986).

As an empirical matter, and as a matter of common sense, penalties *do* deter future misconduct. A recent study of enforcement actions taken by the Occupational Safety and Health Administration ("OSHA"), for example, found

> a significant negative relationship between OSHA inspections that impose a penalty and the change in injuries at the penalized plant over subsequent years. In our analysis, an inspection imposing a penalty reduces injuries by 22% over a three-year period, and reduces lost workdays by 20%. This relationship holds even after testing and controlling for potential biases.

Wayne B. Gray & John T. Scholz, *Does Regulatory Enforcement Work? A Panel Analysis of OSHA Enforcement*, 27 LAW & SOC'Y REV. 177, 199 (1993).[12]

Not surprisingly, this Court has acknowledged the specific deterrent effect of penalties on those who are penalized. *See, e.g., Bennett v. Spear*, 520 U.S. 154, 170 (1997) (finding redressability in Endangered Species Act case because of likelihood that threat of "substantial civil and criminal penalties" will motivate behavior related to the plaintiffs' injuries); *United States Dept. of Energy v. State of Ohio*, 503 U.S. 617, 625 (1992) (noting that where a Clean Water Act defendant is exempt from penalties, it "may break the law where it might have complied voluntarily if it had faced the prospect of punitive fines for past violations."); *Weinberger v. Romero-Barcelo*, 456 U.S. at 314 (identifying civil penalties as a "means of ensuring compliance" with the Clean Water Act).

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[12] The authors of the study found that it was the penalty, and not merely the inspection, that made the difference. *See id.* at 192.

Lower courts have consistently found that civil penalties have a deterrent effect on the Clean Water Act violators on whom they are imposed. Indeed, as discussed *supra*, the Fourth Circuit itself acknowledged in this case that " 'penalties can be an important deterren[t] against future violations.' " *Laidlaw*, 149 F.3d at 306 n.4, *quoting Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1113 (4th Cir. 1988). *See also Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 73 (3d Cir. 1990) (finding Article III redressability because "[p]enalties will deter . . . [the defendant] specifically.").

Courts often decline to issue an injunction precisely because they believe that penalties alone will provide sufficient deterrence. Moreover, the *punitive* nature of penalties is more clearly focused on providing deterrence than is a simple order to comply. *See, e.g., Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975) ("If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality;" it is the "reasonably certain prospect" of a monetary penalty that "provides the spur or catalyst" for compliance); *Reich v. Occupational Safety and Health Review Comm'n*, 102 F.3d 1200, 1203 (11th Cir. 1997) ("As long as a business operates, it should feel itself to be effectively under the applicable laws and regulations – even on the last day. And the continuing potential of penalties – more so than injunctive relief – makes these feelings real."). *See also* S. Rep. No. 99-50, at 29 (1985) (Congress added administrative penalties to the Clean Water Act because "issuance of an administrative [compliance] order, without penalties, has not proven powerful enough to motivate violators . . . ").

C. Deterring A Defendant's Propensity To Violate The Act Serves The Citizen Plaintiff's Interest In Reduced Risk Of Environmental Or Public Health Harm.

Because the imposition of a civil penalty specifically deters the Clean Water Act defendant from committing future violations, civil penalties – no less than injunctions – redress the citizen plaintiff's injury by reducing the level of pollution discharged into a waterway in which he or she has a concrete aesthetic, recreational, or economic interest. As this Court stated in *Steel Company*, "deterring [a defendant] from violating [a regulatory statute] in the future . . . can of course be 'remedial' for Article III purposes, when threatened injury is one of the gravamens" of the citizen plaintiff's action. 118 S. Ct. at 1019.

In a Clean Water Act citizen suit, there is every reason to believe that the defendant who is made to pay a monetary penalty for violating the Act will be less inclined to violate the Act in the future, especially where the defendant is a profit-maximizing company with an economic interest in avoiding future penalty liability. Indeed, in *Bennett v. Spear*, this Court held that the "powerful coercive effect" of monetary penalties on the future behavior of another was sufficient to confer Article III standing on plaintiffs who had invoked the citizen suit provision of the Endangered Species Act. *See* 520 U.S. at 170.

The plaintiffs in *Bennett* challenged the adequacy of a biological opinion issued by the United States Fish and Wildlife Service under the Act. 520 U.S. at 157. The plaintiffs claimed prospective injury because restrictions on lake levels recommended in the biological opinion for the protection of endangered species would, if followed by the Bureau of Reclamation, reduce the amount of water available to the plaintiffs for irrigation. *Id.* at 160 and 167.

The United States argued that the claim did not present a case or controversy under Article III because the Bureau of Reclamation itself was not before the court, and was not, in any event, legally obligated to follow the recommendations set forth in the biological opinion. *Id.* at 168-9. Thus, the United States argued, an order setting aside the biological opinion would not redress the alleged injury. *See id.* This Court disagreed.

> The [Bureau] is technically free to disregard the Biological Opinion . . . but it does so at its own peril (and that of its employees), for 'any person' who knowingly 'takes' an endangered or threatened species is subject to . . . civil fines of up to $25,000 per violation and criminal penalties of up to $50,000 and imprisonment of up to one year . . .

Id. at 170.

In the case at bar, as in *Bennett v. Spear*, the redressability element of Article III is met because penalties have a predictable effect on future behavior. To be sure, the two cases present different situations, but the underlying principle is the same. In *Bennett*, redressability was met because of the likely effect of the threat of penalties on a public agency that had not yet violated the law. Here, it is met by the likely effect of imposing a penalty on a profit-maximizing company that has thus far violated the law with impunity. In either case, redressability is met because penalties deter violations of the law, just as Congress envisioned.

In fact, redressability is more obviously satisfied in this case, where a violator is being prosecuted directly by citizens, than in cases such as *Bennett*, where the plaintiff sues the government seeking to influence the behavior of a party who is not before the court. In those cases, this Court has employed a stricter standard for determining

whether an Article III case or controversy exists. *See Lujan v. Defenders of Wildlife*, 504 U.S. at 562 ("When . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed[,]" because in such situations "[t]he existence of one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts . . . ") (emphasis in original) (citation and internal quotes omitted); *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 41, 46 (1976) (federal courts "act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.") (construing *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973)). In such cases, unless the causal chain leading to redressability is clearly demonstrated, the plaintiff has shown no more than an "undifferentiated public interest" in "vindication of the rule of law" by the government. *Steel Company*, 118 S. Ct. at 1018 (citation and internal quotes omitted).

In the case at bar, on the other hand, the heightened standard of redressability is not applicable, because the party whose conduct the plaintiffs seek to affect – Laidlaw – *is* before the court. The plaintiffs do not seek to compel government prosecution, but rather are themselves prosecuting the very defendant that is causing them injury. If the "coercive effect" of penalties was sufficient to meet the heightened standard of redressability applied in *Bennett*, 520 U.S. at 170, it should be sufficient here as well. It was not sufficient in *Steel Company*, however, because there was no allegation in that case that the defendant would violate in the future. Accordingly, the plaintiffs there had shown

no more than the "undifferentiated public interest" in general deterrence of the regulated community.[13]

II. A DEFENDANT BEARS A HEAVY BURDEN IN ATTEMPTING TO PROVE THAT ITS COMPLIANCE WITH THE LAW HAS MOOTED THE CASE.

Even if Congress had not determined that penalties must be imposed on Clean Water Act defendants to deter their future misconduct, violators who come into compliance with the Act after being sued would bear a heavy burden in attempting to establish that they will not violate in the future (and thus that there is no need for deterrence). As this Court held in *United States v. Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968):

> Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave "[t]he defendant . . . free to return to his old ways." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *see, e.g., United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290 (1897).

This Court has made it difficult for a defendant to establish that its post-complaint return to lawful behavior

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[13] This is not to say that the public interest is not relevant to a determination of redressability. When citizens have been authorized by Congress to enforce a public law, redressability should account for public, as well as private, benefits. Adoption of this view of redressability would be consistent with the common law tradition of encouraging citizens to enforce public laws through *qui tam* and *quo warranto* actions. *See generally*, George Van Cleve, *Congressional Power to Confer Broad Citizen Standing in Environmental Cases*, 29 ENVT'L L. REP. 10028 (1999). *See also Japan Whaling Assoc. v. American Cetacean Society*, 478 U.S. 221, 220 n.4 (1986).

has made a case moot. As stated in *Gwaltney*, "[i]n seeking to have a case dismissed as moot . . . the defendant's burden 'is a heavy one.' " 484 U.S. at 66 (*quoting United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

> The defendant must demonstrate that it is '*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.' *United States v. Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968).

Gwaltney, 484 U.S. at 66 (emphasis added). This heavy burden "protects plaintiffs from defendants who seek to evade sanction by predictable 'protestations of repentance and reform.' *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952)." *Id.* at 67.

As noted in *Steel Company*, 118 S. Ct. at 1020, a presumption of future injury "applie[s] to refute the assertion of mootness by a defendant who, when sued in a complaint that alleges present or threatened injury, ceases the complained-of activity."[14] This presumption fully supports the congressional determination that Clean Water Act defendants need to be penalized to deter their propensity to commit future violations.

As this Court has stressed, arguments that post-complaint changes have eliminated the underlying case or

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[14] In *Steel Company*, this Court contrasted the situation where a defendant complies after the complaint is filed – a situation, like the one in the case at bar, in which the presumption of future injury does apply – with the situation where a defendant takes the steps necessary to attain lasting compliance before the complaint is filed, a situation in which the presumption does not apply. 118 S. Ct. at 1020. This Court has been unwilling to apply the presumption for the purpose of attaining initial Article III jurisdiction (standing), but does employ it for the purpose of *retaining* such jurisdiction (mootness). *See id.*

controversy are to be evaluated under principles of mootness, not standing.[15]

And while mootness and standing are related, they are not the same. This Court has described mootness as " 'the doctrine of standing set in a time frame,' " *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997) (citation omitted).[16] The difference in time frame produces differences in the Article III analysis. When a defendant claims that its *post-complaint* change in conduct has deprived the court of an Article III case or controversy, the burden of proof shifts from the plaintiff to the defendant, a presumption of ongoing harm applies, and the nature of the inquiry shifts from the plaintiff's qualifications to the defendant's conduct.

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[15] *Steel Company* acknowledges this distinction in rejecting an argument by the United States that the presumption of ongoing harm applied when analyzing a defendant's claim of mootness should be invoked to assist a plaintiff in establishing standing. *See* 118 S. Ct. at 1020 ("The 'presumption' the Government refers to has been applied to refute the assertion of *mootness* by a defendant who, when sued in a complaint that alleges present or threatened injury, ceases the complained-of activity. . . . It is an immense and unacceptable stretch to call the presumption into service as a substitute for the allegation of present or threatened injury upon which initial *standing* must be based.") (emphasis added). *See also Gwaltney*, 484 U.S. at 69 (Scalia, J., concurring) ("It does not suffice to defeat subject matter jurisdiction that the success of the attempted remedies becomes clear months or even weeks after the complaint is filed. Subject matter jurisdiction 'depends on the state of things at the time of the action brought'; if it existed when the suit was brought, 'subsequent events' cannot 'oust[ ]' the court of jurisdiction.") (citations omitted).

[16] Unlike the case at bar, *Arizonans* involved post-complaint changes in the *plaintiff's* status, 520 U.S. at 72, as opposed to post-complaint changes in the *defendant's* conduct.

In the case at bar, the district court found after a trial that Laidlaw needed to be deterred from violating the Act in the future, and accordingly imposed a $405,800 penalty. Laidlaw did not meet the heavy burden of establishing that such deterrence is not necessary.[17]

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[17] Laidlaw may now argue that this case became moot *after* the Fourth Circuit issued its decision, by virtue of the reported closing of Laidlaw's plant. There are no facts in the record to indicate that Laidlaw has met its heavy burden of proving the case is moot due to the reported plant closing. Furthermore, the plaintiffs are entitled to discovery as to the nature of the plant closure, and should be given an opportunity to submit their own evidence on that issue. *See, e.g., Reich,* 102 F.3d at 1203 (expressing concern that defendants would attempt "to avoid a penalty by going out of business and, perhaps, then reincorporating under a different name."). Moreover, if this Court does conclude that Laidlaw has met its heavy burden of proving that this case is moot due to the plant closure, the decision of the Fourth Circuit, but not the decision of the district court, should be vacated. In assessing how to dispose of an otherwise moot case, this Court has made it clear that the inquiry should consist of an equitable analysis focusing on the cause of the mootness. *United States Bancorp Mortg. Co. v. Bonner Mall Partnership,* 513 U.S. 18, 24 (1994). As this Court explained in *Bancorp*: "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment. *The same is true when mootness results from unilateral action of the party who prevailed below." Id.* at 25 (emphasis added). If this Court concludes that Laidlaw's closing of the plant mooted the case, the plaintiffs will have been prevented from obtaining review of the Fourth Circuit's decision solely by Laidlaw's unilateral action in closing the plant, and that decision should be vacated.

III. REGARDLESS OF WHETHER THE CASE IS MOOT, PLAINTIFFS ARE ENTITLED TO ASSERT THEIR CLAIM FOR REASONABLE ATTORNEYS' FEES UNDER THE CLEAN WATER ACT.

A. When A Case Becomes Moot Through No Fault Of The Plaintiff, The Federal Courts Retain Jurisdiction To Adjudicate The Plaintiff's Claim For Statutory Attorneys' Fees.

Regardless of whether the underlying merits of a citizen plaintiff's claims are moot, the federal courts retain jurisdiction to determine whether the plaintiff is entitled to an award of statutory costs, including attorneys' fees,[18] under the Clean Water Act. *See* 33 U.S.C. § 1365(d). It is well-settled that a dispute over litigation costs and attorneys' fees is separable from the merits of the underlying case, *see, e.g., Budinich v. Becton Dickinson and Co.,* 486 U.S. 196, 202-3 (1988), and that federal courts retain jurisdiction to adjudicate disputes over costs and fees even after the underlying litigation has been resolved. *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 395-6 (1982) ("It is well established that a federal court may consider collateral issues after an action is no longer pending. . . . Thus, even years after the entry of a judgment on the merits a federal court could consider an award of counsel fees.") (quotations and citations omitted).

In the mootness context, this Court has explicitly recognized the ancillary power of federal appellate courts to award costs and fees when a case is mooted pending appeal. *Bancorp,* 513 U.S. at 21. This principle applies

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[18] The Clean Water Act's citizen suit provision specifies that attorneys' fees and expert witness fees are to be taxed and collected as "costs." 33 U.S.C. § 1365(d).

throughout the course of federal litigation: whenever a district court, court of appeals or this Court determines that a controversy is moot, that court retains jurisdiction to dispose of the case "as justice may require," *id.* at 21-22 (citations and quotations omitted), including, in appropriate circumstances,[19] an award of fees and costs.

The same residual power allows courts to resolve conflicts over statutory fees after settlement of the underlying dispute. *See Maher v. Gagne*, 448 U.S. 122, 129 (1980) (recognizing power of federal courts to award post-settlement attorneys' fees to prevailing plaintiff under Civil Rights Attorney's Fees Awards Act). Since settlement of the underlying merits moots a case except as to fees, *see, e.g., Bancorp*, 513 U.S. at 20, this Court's approval of post-settlement fee litigation confirms that, like appellate courts, federal district courts retain jurisdiction over ancillary matters like fee disputes even after the underlying merits have become moot.[20]

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[19] These circumstances would include where fees and costs are available by common law, *see, e.g., Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939) (awarding fees several years after entry of judgment to plaintiff who produced benefit commonly available to others similarly situated), or, as here, by statute. *See Bancorp*, 513 U.S. at 22 ("Congress may authorize us to enter orders necessary and appropriate to the final disposition of a suit that is before us for review.") As discussed *infra*, Part III.B., Congress intended the district court's authority to award litigation costs under section 505(d) of the Clean Water Act to a "prevailing or substantially prevailing party" to extend to cases where the plaintiff's suit is a catalyst for the defendant's post-complaint compliance with the Act.

[20] Every circuit to address the issue, including the Fourth Circuit, has ruled that federal district courts retain jurisdiction after a case is mooted to assess whether the plaintiff was a "prevailing party" for purposes of statutory fees. *See, e.g., Comfort Lake Ass'n, Inc. v. Dressel Contracting, Inc.*, 138 F.3d 351, 357 (8th Cir. 1998) (Clean Water Act); *Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 128 (2d Cir. 1991) (same); *Grano v. Barry*, 783 F.2d 1104, 1108 (D.C. Cir. 1986) (Civil Rights Attorney's Fees Awards Act); *Doe v. Marshall*, 622 F.2d 118, 120 (5th Cir. 1980), *cert. denied*, 462 U.S. 993 (1980) (same); *Williams v. Alioto*, 625 F.2d 845, 848 (9th Cir. 1980), *cert. denied*, 450 U.S. 1012 (1980) (same); *Bagby v. Beal*, 606 F.2d 411, 413 (3d Cir. 1979) (same); *S-1 and S-2 v. State Bd. of Educ. of North Carolina*, 21 F.3d 49, 51 (4th Cir.) (en banc) (per curiam), *cert. denied*, 513 U.S. 876 (1994) (same).

This Court has implicitly recognized in the specific context of a Clean Water Act citizen suit that a plaintiff's claim for costs and attorneys' fees survives the mooting of the underlying merits where the mooting event is caused by the unilateral conduct of the defendant. *See Gwaltney*, 484 U.S. at 67 n.6. This case presents precisely the situation the Court envisioned in *Gwaltney*: a defendant that comes into compliance during the pendency of a citizen suit. If a defendant's post-complaint achievement of compliance is sufficient to evade an obligation to pay the litigation costs of a prevailing citizen plaintiff, citizen suit plaintiffs would be deprived of the very protection identified by the Court in *Gwaltney*. A citizen plaintiff could devote substantial time and resources to enforcing the Clean Water Act against a persistent violator, only to have the plaintiff's entitlement to statutory fees eliminated by the defendant's decision to do that which the plaintiff seeks.[21]

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[21] Enforcement of the Act would be seriously undermined, since citizen plaintiffs without resources to pay an attorney would be unlikely to find one who is willing to accept the risk that the case will be mooted – and the right to attorneys' fees eradicated – by the defendant's unilateral conduct, even years into the litigation.

B. Under The Clean Water Act, A Plaintiff Is Entitled To An Award Of Fees When The Citizen Suit Is A Catalyst In Bringing The Defendant Into Compliance.

A citizen plaintiff whose suit is a catalyst in bringing a defendant into compliance is a "prevailing or substantially prevailing party" for purposes of a fee award under the Clean Water Act. The Act's citizen suit provision provides in pertinent part:

> The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.

33 U.S.C. § 1365(d). A citizen plaintiff who "has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit' . . . has crossed the threshold to a fee award of some kind" as a prevailing party. *Texas State Teachers Assn. v. Garland Independent School District*, 489 U.S. 782, 791-92 (1989) (construing 42 U.S.C. § 1988, and citing *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). The critical question in determining whether a party is "prevailing" is whether, at a minimum, the plaintiff can "point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Id.* at 792.

Thus, a plaintiff need not obtain a judgment, nor even enter into a formal settlement, to be considered a prevailing party:

> A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment – *e.g.*, a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.

Hewitt v. Helms, 482 U.S. 755, 760-61 (1987) (citation omitted). Conversely, even a nominally favorable judgment will not afford a plaintiff "prevailing" party status if the judgment fails to "affect[ ] the behavior of the defendant toward the plaintiff." *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988). In short, it is the result that matters.

Here, after the complaint was filed, Laidlaw brought its mercury discharges into compliance with the Act and the plaintiffs thus have "crossed the threshold" to prevailing party status.[22]

In holding that the plaintiffs are not entitled to recover attorneys' fees, the Fourth Circuit misreads both this Court's decision in *Farrar v. Hobby*, 506 U.S. 103 (1992), and the language and legislative history of section 1365(d). *Amici* adopt the arguments presented in the briefs of plaintiffs and of *amici curiae* Public Citizen and the American Civil Liberties Union demonstrating that *S-1 & S-2*, 21 F.3d at 51, wrongly held that *Farrar v. Hobby* overruled the "catalyst" doctrine in attorneys' fee awards.

Moreover, Congress specifically intended that a citizen plaintiff whose Clean Water Act suit is a catalyst in

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[22] This is in contrast to cases where an order vacating a judgment on grounds of mootness *deprives* a plaintiff of relief, in which the plaintiff cannot be said to be a prevailing party. *See, e.g., Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990) (change in legal framework governing the case during pendency of appeal deprived plaintiff of its claim for relief). Here, it is plaintiffs' *success* in changing the defendant's behavior prior to judgment that arguably renders the case moot.

bringing a defendant into compliance be considered a "prevailing or substantially prevailing party." Before the 1987 amendments to the Clean Water Act, section 1365(d) provided that fees may be awarded to "any party, whenever the court determines such an award is appropriate." *See Gwaltney*, 484 U.S. at 67 n.6 (quoting previous version of statute). In enacting that provision, Congress stated that an award of costs:

> should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions.

Id. (*quoting* S. Rep. No. 92-414, at 81 (1971)).

Congress amended section 1365(d) in 1987 to add the words "prevailing or substantially prevailing" before "party." On its face, the plain language of this amendment does not alter the conclusion reached in *Gwaltney*. Indeed, the amendment merely brings the Clean Water Act's attorneys' fees provision into closer alignment with the language of the civil rights statutes.[23] And by 1987, it was already "settled law . . . that relief need not be judicially decreed in order to justify a fee award" under the civil rights statutes. *Hewitt v. Helms*, 482 U.S. at 760. Since it is presumed that Congress expects its statutes to be read in conformity with Supreme Court precedent,

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[23] If anything, by using the phrase "prevailing *or substantially prevailing*," Congress made the universe of plaintiffs entitled to fees under the Clean Water Act even larger than that under the Civil Rights Attorneys' Fee Awards Act, 42 U.S.C. § 1988, which only provides for fees to "prevailing" parties.

United States v. Wells, 519 U.S. 482, 495 (1997), Congress's deliberate use of the "prevailing party" language in section 1365(d) must be understood to encompass plaintiffs who succeed by virtue of the defendant's post-complaint compliance.

The legislative history of the 1987 amendments also makes clear that Congress did not intend to reverse itself and preclude an award of fees to a citizen plaintiff whose suit serves as the catalyst spurring a defendant to abate its violations of the Act before a verdict is issued. Instead, this amendment had a single, and very different, purpose: to ensure that plaintiffs who affirmatively *lose* on all litigated issues do not receive fee awards.

The Senate Report on the 1987 amendments states that Congress was reacting to the decision in *Sierra Club v. Gorsuch*, 672 F.2d 33 (D.C. Cir. 1983), *rev'd sub nom. Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), in which

> the court of appeals held that it was 'appropriate' to award fees under the Clean Air Act to the petitioner even though the government had prevailed on all issues. . . . Accordingly, these amendments [to 1365(d) and adding a new section 1369(b)(4)] would limit the awarding of costs under the Clean Water Act to prevailing or substantially prevailing parties.

S. Rep. No. 99-50, at 33 (1985). Emphasizing that it is not appropriate to assess costs "when the opposing party has not prevailed on the issues," the Senate Report makes clear that in other respects the fee-shifting provision of the Act was *not* being altered, by listing several examples. Fees may still be awarded, as before, to "a partially prevailing party with respect to the issues on which that party has prevailed" and to a party who has achieved "a successful settlement," and fees may be denied, as before, to a party "technically on the prevailing side [who] fails

to make a substantial contribution to the successful outcome of the case." *Id.*

No negative inference should be drawn from Congress's failure to specifically list the situation presented here – that of a defendant who abates its violations before a judgment or settlement is reached – since that situation is omitted both from the enumerated situations in which a party *is* entitled to costs and from the enumerated situations in which a party is *not* entitled to costs. If any inference is to be drawn, it is that if Congress had meant to preclude an award of costs under circumstances where it previously had allowed such awards, Congress would have said so.

Accordingly, even if this Court were to conclude that the underlying dispute here is now moot, the case should be remanded for the district court to assess whether the plaintiffs qualify as "prevailing or substantially prevailing part[ies]" under section 1365(d).[24]

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[24] Since the district court implicitly found that plaintiffs are entitled to an award of statutory fees, *Laidlaw*, 956 F. Supp. at 610-11, the sole remaining issue may be the determination of a "reasonable" amount under the statute. *See* 33 U.S.C. § 1365(d).